UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

NEW YORK PAVING, INC.

Respondent

And **Case No. 29-CA-234894**

CONSTRUCTION COUNCIL
LOCAL 175, UTILITY WORKERS
UNION OF AMERICA, AFL-CIO
Charging Party

and

ELIJAH JORDAN, an Individual **Case No. 29-CA-233990**

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ALJ'S DECISION

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Counsel for the General Counsel (CGC) respectfully submits this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's (ALJ's) Decision filed by New York Paving, Inc. ("NY Paving" or "Respondent"). For the reasons set forth below, CGC hereby requests that Respondent's exceptions be denied in their entirety and that the ALJ's December 10, 2019 decision in this case be affirmed.

I. PRELIMINARY STATEMENT

On April 29, 2020, Respondent filed exceptions and a supporting brief disputing Judge Lauren Esposito's well-supported finding that Respondent violated Section 8(a)(5) of the Act by unilaterally transferring bargaining unit work from employees represented by Construction Council Local 175, Utility Workers Union of America, AFL-CIO ("Local 175") to employees represented by a rival union, Highway Road and Street Construction Laborers Local 1010 of the District Council of Pavers and Builders, LIUNA, AFL-CIO ("Local 1010"). Specifically, Judge Esposito found that Respondent, without giving Local 175 notice or opportunity to bargain, unlawfully transferred three types of Local 175 unit work to employees represented by Local 1010: (1) the placement of asphalt finish pursuant to Respondent's Emergency Keyhole contract with subcontractor, Hallen Construction, Corp., (2) the placement of temporary asphalt on sidewalks categorized as Code 92; (3) and digging out of a type of temporary asphalt referred to as "cold patch" from smaller cuts in streets and sidewalks followed by reinforcing those holes with asphalt, categorized as Code 49. Respondent also excepted to Judge Esposito's finding that employee Steven Sbara was Respondent's agent under Section 2(13) of the Act.

Respondent excepts first to Judge Esposito's supplementing the record, *sua sponte,* with the collective bargaining agreement between New York Independent Contractors Alliance, Inc. ("NYICA") and United Plant and Production Workers Local Union 175, dated July 1, 2014

through June 30, 2017 ("2014-2017 CBA"). Respondent claims in its Exceptions that by supplementing the record with the 2014-2017 CBA, rather than finding that CGC had not made out a *prima facie* or drawing an adverse inference against CGC for failing to introduce the CBA in her case in chief, Judge Esposito abused her discretion.

As addressed further below, Respondent's contention regarding the admission of the 2014-2017 CBA have no legal basis. Excerpts of the 2014-2017 CBA were included in two previous cases before the agency involving the parties: *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*, 366 NLRB NO. 174, a Section 10(k) proceeding involving NY Paving, Local 175 and Local 1010 for which the Board issued a decision on August 24, 2018 and *New York Paving, Inc.*, JD-33-19, which was decided by Judge Andrew S. Gollin on April 5, 2019. During the instant hearing, Judge Esposito took administrative notice of both decisions upon CGC's request. Tr. 685. Thus, Judge Esposito was well-justified in finding that CGC had presented a *prima facie* case of the unlawful transfer based on the excerpts of the 2014-2017 CBA in prior cases, and based on credible testimony in the record regarding Respondent's past practice in allocating the work. Nevertheless, on November 21, 2019, Judge Esposito gave notice to the parties that she believed it necessary to introduce the 2014-2017 CBA in its entirety as to best evaluate the transfer of work allegations, and asked the parties to submit positions regarding entry of the CBA. As both parties had access to the 2014-2017 CBA, which was ultimately found to contain language in support CGC's case, the ALJ was also justified in rejecting Respondent's request for an adverse inference against CGC for failing to produce the 2014-2017 CBA as part of her case in chief. On December 10, 2019, Judge Esposito issued an Order admitting the 2014-2017 CBA over Respondent's objections, in accordance with the discretion granted her under the

National Labor Board's Rules and Regulations in supplementing the record with the 2014-2017 CBA.

Second, Respondent claims that Judge Esposito mistakenly failed to draw a conclusion that Local 175 was well aware of the transfer of the emergency keyhole work more than six months before filing the charge, and that she thus erred in rejecting its defense that the transfer of the emergency keyhole work was time-barred under Section 10(b) of the Act. As will be shown below, Judge Esposito was entirely justified in her refusal to draw such a conclusion as Respondent bases this claim on facts not in the record. Specifically, Respondent's insinuation that Local 175 was aware that the Emergency Keyhole Contract with Hallen was the only asphalt work taking place by NY Paving in the Bronx is unsubstantiated by the record. Thus, Judge Esposito correctly found that Local 175's limited and intermittent observations of Local 1010 members completing asphalt work in the Bronx did not constitute the required "clear and unequivocal notice" to commence the 10(b) period, and that Local 175 did not fail to exercise due diligence in addressing rumors of a transfer of work that would warrant dismissal und Section 10(b) of the Act.

Third, Respondent insists that Judge Esposito erred by refusing to rely solely on the percentage of asphalt work and material involved in the Emergency Keyhole Contract, as testified to by its Director of Operations, Peter Miceli, to conclude that the transfer of the keyhole work was *de minimums*. Contrary to Respondent's assertions, Judge Esposito's reliance on Miceli's testimony regarding the approximate number of man-hours per month involved in the emergency keyhole work provided the correct analysis, as Miceli's testimony regarding the hours required to do the keyhole work plainly shows the loss incurred by Unit employees given the continuing nature of the transfer, and allowed her to compare it to cases where the Board had found similar transfers of work to be more than *de minimus*.

Fourth, Respondent claims that Judge Esposito applied the incorrect legal standard in rejecting its defense that it had no control over its assignment of the emergency keyhole work. Respondent argues that Judge Esposito erred by refusing to apply to the instant case *S. Mail, Inc., et al, A Single Employer & Am. Postal Workers Union, AFL-CIO*, 345 NLRB 644 (2005) and *Exxon Research & Eng'g Co. v. N.L.R.B.*, 89 F.3d 228, 232 (5th Cir. 1996), where the Board and the 5th Circuit Court both found a third party's actions to deprive the employer of control over an alleged unilateral change. Judge Esposito's refusal to apply the two cases, one inapposite and the latter not controlling, was entirely appropriate, in light of the number of Board cases which stand for the principle that an employer cannot violate its collective bargaining agreements merely because of the threat of financial loss. Here, Respondent's claim that its 2018 Emergency Keyhole Contract with Hallen effectively prohibited it from using Local 175 members on the contracted work is only true insofar as Respondent's failure to comply with such provisions could have resulted in loss of the contract, and the cases cited by Judge Esposito were entirely applicable.

Fifth, Respondent makes a desperate claim that the ALJ erred by refusing to find that Board's decision in *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)*, 366 NLRB No. 174 permitted it to transfer additional work outside the Asphalt Unit. Here, Respondent again contests Judge Esposito's admission of the 2014-2017 CBA, claiming that her supplementing the record after close of the hearing denied it due process insofar as Respondent lost its opportunity to argue that the Local 1010 CBA could have also covered the Code 92 and Code 49 work. Essentially, Respondent argues that it was denied the opportunity to conduct another hearing pursuant to Section 10(k) of the Act. However, this defense also fails as the Board's decision cannot be read to include work that was not in dispute in the 10(k) hearing, and

Respondent cannot further litigate any claimed jurisdictional disputes in the absence of any evidence of a threat of work stoppage.

Finally, regarding the status of Local 1010 Shop Steward Stephen Sbara, Respondent argues that the ALJ erred by relying on Elijah Jordan's testimony to conclude that Sbara was an agent, given the testimony from three of Respondent's employees which did not definitively establish Sbara as an agent. Counter to Respondent's assertion, however, Judge Esposito's determination did not rely on Jordan's testimony at all, but rather was based largely on the testimony of Respondent's managerial witnesses, including Operations Manager Peter Miceli and Supervisor Louis Sarro, who would presumably have the most knowledge about the responsibility and authority given to Sbara, and who admitted to holding Sbara out to its employees as a voice for the company. Thus, Judge Esposito's determination that Sbara was Respondent's agent under Section 2(13) of the Act is also supported by the facts adduced at the hearing and the relevant case law.

As explained in further detail below, the Board should find that Judge Esposito acted well within her discretion in admitting the 2014-2017 CBA and refusing to grant an adverse inference against CGC for failing to enter the CBA during her case in chief. The Board should further find that Judge Esposito's consideration of the facts and the law regarding the alleged transfer of work and the agent status of Sbara were well supported. Accordingly, the Board should affirm ALJ Esposito's decision in its entirety.

II. BACKGROUND FACTS[1]

A. New York Paving's Business Operations

Respondent NY Paving provides asphalt and concrete paving, construction seal coating and related services for major utility companies, including National Grid and ConEdison ("ConEd), and to subcontractors, including Hallen Construction Corp. ("Hallen"). Tr. 422. NY Paving's operations pertinent to this case run out of a yard located at 37-18 Railroad Avenue, Long Island City, New York. Since October 2007, NY Paving employees who predominantly perform asphalt paving have been represented by Local 175 and have been governed by the terms of Local 175's collective bargaining agreement with the New York Independent Contractors' Alliance ("NYICA"). NY Paving employees who primarily perform the laying of concrete have been represented since January 2006 by Local 1010, and have been governed by the terms encompassed in Local 1010's collective bargaining agreement with NY Paving. *New York Paving, Inc.,* Case 29-CA-197798 et al, 2019 WL 2208710. Respondent's asphalt workers ("Asphalt Unit") chose Local 175 as their exclusive bargaining representative pursuant to a Board-conducted representation election. *Id.* at p. 4-5.

Peter Miceli is NY Paving's Director of Operations, a role he has held for 22 years. Tr. 421, 837. Robert Zaremski is NY Paving's Operations Manager and oversees and directs the routes and crews performing asphalt work out of the Long Island City yard. Tr. 491-92. Louis Sarro is similarly responsible for routes and crews performing concrete work out of the Long Island City yard. Tr. 785-787.

[1] All relevant and material facts have been completely and accurately set forth in the ALJ's Decision. While CGC does not agree with the ALJ's credibility determinations regarding the alleged discriminatee Elijah Jordan, CGC has decided not to file exceptions in light of ALJ Esposito's reasoning for her credibility finding.

Terry Holder is employed by NY Paving in the Asphalt Unit and is the shop steward for Local 175. Tr. 219-220. Steven Sbara is an employee of NY Paving and is the shop steward for Local 1010.

During the hearing before Judge Andrew S. Gollin in *New York Paving, Inc.*, JD-33-19, NY Paving stipulated that it adopted the terms of Local 175's collective bargaining agreement with NYICA by conduct, although it claims that NY Paving is not a member of NYICA. The NYICA-Local 175 collective bargaining agreement (hereinafter 2014-2017 CBA) was effective by its terms from July 1, 2014 through June 30, 2017, and included the following clause regarding its renewal:

> This agreement shall continue in effect until and including June 30, 2017 and during each year thereafter unless on or before the fifteenth (15th) day of March 2017, or on or before the fifteenth (15th) day of March of any year thereafter, written notice of termination or proposed changes shall have been served by either party on the other party…In the event that written notice shall have been served, an agreement supplemental hereto, embodying such changes agreed upon, shall be drawn up and signed by June 30th of the year in which notice shall have been served.

(ALJ Exh. 1). In a complaint requesting declaratory relief filed by Respondent in the United States District Court for the Eastern District of New York on May 18, 2018, NY Paving claimed to have provided notice terminating the collective bargaining agreement with Local 175 on February 18, 2018. (R Exh 20, p.8 Case 1:18-cv-02968). According to the same complaint, however, Respondent also stated that Local 175 took the position that the contract had been renewed for an additional five years. (R Exh. 20 p. 12).[2]

The 2014-2017 CBA covered "All Asphalt Paving work," defined as follows:

> (a) Prepare for and perform all types of asphalt paving, slurring including methacrylate and other similar materials and milling of streets and roads, and all other preparation work involved to prepare for resurfacing and to

[2] Respondent also filed a charge against Local 175 in Case No. 29-CB-230653 alleging that Local 175 had refused to bargain in bad faith for a new collective bargaining agreement. Respondent ultimately withdrew that charge.

> operate small power tools, operate all equipment necessary to install all types of resurfacing including sandblasting, chipping, scrapping of all 10 materials, install and repair fences and all incidental work thereto to continue into parks, plazas, malls, housing projects, playgrounds, said work including but not limited to public highways and roads and bridges; including, but not limited to all subsequent work prior to final paving.
>
> (b) All asphalt slurry (protective polymer) restoration work, including all preparation for slurry and all bridges, temporary asphalt paving necessary on streets, sidewalks and private property and federal, city, local and state and roads subsequent to subway, sewer, water main, duct line construction and other similar type jobs.
>
> (c) Any laboring work related to the preparation and cleanup of all Turf and all material, used as a base for Turf including drainage, all landscaping, all labor relating to planting and maintenance, cleanup, installation and removal of play equipment, slurry/seal-coating, line striping and sawcutting, shall be performed by persons under the jurisdiction of Local 175.
>
> (d) Maintenance and protection of traffic safety for all work sites.
>
> (e) All other General Construction work related to Asphalt Paving
>
> (f) Safety Watchman
> Signaling in connection with the handling of materials, watchmen on all construction sites, Traffic control and all elements to ensure a safe work environment.

ALJ Exh. 1, p. 9; see also *Highway Rd. & St. Constr. Laborers Local 1010,* WL 4070102 at *4. At hearing, Respondent did not proffer additional contracts or memoranda that contradicted the Asphalt Unit work as described in the 2014-2017 CBA.

B. The Relationship Between NY Paving and Local 175 Sours in the Fall of 2016

NY Paving's Director of Operations, Peter Miceli, testified at hearing that the relationship between NY Paving and Local 175 began to sour around the Fall of 2016. Tr. 838. Miceli conceded that part of the reason for this deterioration was due to a change in ConEd's contractual relationship with its subcontractors, including Hallen. In 2014, ConEd amended its Standard Terms and

Conditions for Construction Contracts to require its subcontractors to employ only workers represented by local building trades unions affiliated with the Building & Construction Trades Council of Greater New York (NYCBTC). See *New York Paving, Inc.,* JD-33-19 at p. 6-7; see also *Nico Asphalt Paving, Inc.,* 368 NLRB No. 111 at p.3 (2019); *Tri-Messine Construction Company, Inc.,* 368 NLRB N0. 149 at p. 5-6 (2019). Local 175 is not a member of the NYCBTC. Thus, ConEd's amendment to its Standard Terms agreement with subcontractors affected Respondent's use of Local 175 members to perform work on ConEd projects.

Also contributing to the tension between Respondent and Local 175 was Respondent's unlawful assistance and support to Local 1010 in its April 28, 2017 petition for a representation election seeking to replace Local 175 as the collective bargaining representative of NY Paving's asphalt workers. *New York Paving Inc.,* JD-33-19, at p.2. As found by Judge Gollin, during this period, NY Paving violated Sections 8(a)(1) and (2) of the Act by urging employees represented by Local 175 to sign authorization cards for Local 1010. *Id.* at p. 32. Judge Gollin also found that NY Paving violated Section 8(a)(1) of the Act by threatening employees represented by Local 175 with discharge if they did not sign authorization cards for Local 1010. *Id.* No exceptions were filed to Judge Gollin's decision, and on May 29, 2019, the Board adopted his findings.

C. Local 175 Loses Excavation, Seed and Sod, Related Clean up, and Sawcutting Work Pursuant to 10(k) Decision

It is undisputed that since the summer of 2017, Respondent had been transferring work out of the bargaining unit in a piecemeal fashion without bargaining with Local 175, and that there had been several prior disputes between the parties regarding the suspected transfers. The first known incident prompted the jurisdictional dispute resolved in *Highway Rd. & St. Constr. Laborers Local 1010,* 366 NLRB No. 174, WL 4070102 (Aug. 24, 2018). According to Operations Manager Miceli, NY Paving began reassigning work from Local 175 to Local 1010 following an

April 1, 2017 change in the New York Department of Transportation's regulations requiring all holes in streets be filled by a concrete base as opposed to being filled with just asphalt. Tr. 948; 366; *New York Paving Inc.,* JD-33-19, at p. 6. On April 28, 2017, Local 175 filed a grievance pertaining to NY Paving's transfer of work out of the Asphalt Unit. Tr. 631: 20-24; 633: 11-18; *Highway Rd. & St. Constr. Laborers Local 1010,* WL 4070102 at *2. Two months later, in a letter to NY Paving dated July 5, 2017, Local 1010 asserted that the work had been properly assigned to its members and threatened to take "all actions necessary to protect its members' rights to continue performing the work in question at [NY Paving], including but not limited to picketing and work stoppages." *Id.* at *1. The next day, NY Paving filed a charge against Local 1010 alleging a violation of Section 8(b)(4)(D) of the Act. As a result of this charge, the Board held a jurisdiction dispute hearing pursuant Section 10(k) of the Act, during the period between September and October, 2017. *Id.* On August 24, 2018, a Board decision issued awarding the disputed work—excavation work, seed and sod installation, cleanup work and saw cutting —to Local 1010. *Id*. The Board defined excavation as "the removal of the asphalt, concrete, dirt, and other materials from holes left by utility companies so that they can be refilled and repaved." *Id.* at *1. Notably, the Board did not award any placement of *asphalt*, temporary or otherwise, to Local 1010.

D. NYP Assigns Asphalt Work to Local 1010 in November 2017 and Resolves Subsequent Grievance by Agreeing to Contribute to Local 175 funds

In November 2017, pending the Board's 10(k) decision, Local 175 became aware that NY Paving had assigned several Local 1010 members to perform asphalt paving work that was not subject to the 10(k) hearing. Subsequently, on November 15, 2017, Local 175 Attorney Eric Bryon Chaikin filed another grievance against NY Paving alleging that Respondent has wrongfully assigned the work to NY Paving employees represented by Local 1010. Tr. 638: 16-20; 641: 15-25; R. Exh. 9. The grievance was cc'ed to NY Paving's attorney Jonathan Farrell. R. Exh. 9.

Attorney Farrell responded to the grievance by letter dated November 16, 2017, asserting that NY Paving had a right to hire the Local 1010 members for the work, as under its contract with Local 175, NY Paving had seven days after the date of hiring to require the employees to become members in good standing of Local 175. Farrell further responded that the employees would be paid at the rates agreed to in its collective bargaining agreement with Local 175, and that NY Paving would remit any and all benefit contributions to the proper Local 175 funds on behalf of those employees. Tr. 642: 5-23; GC Exh. 22. Shortly thereafter, on or about December 8, 2017, NY Paving submitted a remittance form to the Local 175 Fund making the payments to the funds on behalf of the Local 1010 members who were the subject of the November 15 grievance. Tr. 643: 643-645; GC Exh. 23. According to Local 175 Attorney Chaikin, this exchange resolved the Union's grievance at that time. Tr. 655.

It is undisputed that Respondent's December 8, 2017 was the only instance when NY Paving contributed into the Local 175 funds for asphalt paving work done by employees not represented by Local 175. Tr. 571: 22-25; 572: 1-3; 573; 647: 10-17. On May 18, 2018, NY Paving filed an action for declaratory judgment to be released from the obligation to make funds payments in both the Local 1010 and Local 175 funds accounts for the same work. Tr. 573: 16-25; 574-575; R Exh. 20. According to Local 175 Attorney Chaikin, since the resolution of its November 2017 grievance based on Attorney Farrell's representation that contributions would be made to the Local 175 Funds, the Union has made no further concessions allowing non-Local 175 members to do asphalt paving work at NY Paving. Tr. 648: 19-24.

E. Local 175 Begins Hearing Rumors of NY Paving Assigning Local 1010 members Asphalt Work in the Bronx, Manhattan and Queens Beginning in Spring of 2018

Both Local 175 Shop Steward Terry Holder and Local 175 Business Representative Charlie Priolo testified that during 2018, they intermittently observed Local 1010 members engaged in or setting out to perform asphalt work for NY Paving. Priolo testified that during the time that he has served as business representative, many rumors circulated about asphalt paving work at NY Paving being done by non-Local 175 members. Priolo testified that around late 2018, he had observed seven or eight instances of non-members performed asphalt paving work on the street in Queens and the Bronx. (Tr. 358: 11-25; 359; 360: 1-13; 381). Based on his many years' experience as a laborer and his knowledge that ConEd controlled the Bronx, Manhattan and Queens gas lines, Priolo suspected that the work may have somehow been connected to ConEd. Tr. 353-354; 356: 11-23.

At hearing, Shop Steward Holder described two particular instances where he believed that Respondent has assigned asphalt work for ConEd to Local 1010 members. Holder testified that sometime in the beginning of April 2018, NY Paving had purchased two new trucks numbered 215 and 216. Respondent assigned Holder to use truck 216. Tr. 247: 15-16; 330: 6-8. Shortly after he was assigned Truck 216, Operations Manager Robert Zaremski told Holder that he would be sharing the truck with Local 1010; Zaremski assigned Holder to a different truck for that day. Tr. 247: 15-24; 249: 15-20. Holder further testified that on one occasion, several Local 1010 employees who were using truck 216 asked Holder for the location of various tools necessary to work with asphalt. Tr. 250: 14-25; 251: 1-12. Holder testified that Supervisor Zaremski later advised Holder that the Local 1010 crew would be doing the Manhattan cuts, which Holder understood meant putting asphalt over the concrete in the excavated holes, given how the truck was outfitted. Tr. 348: 15-25; 349: 1-13; 351. According to Holder, whenever he was assigned that

type of work in Manhattan or the Bronx, it was for ConEd. Tr. 352: 1-5. However, Holder also testified that he was not familiar with the term "keyhole work" and otherwise unaware of the contract under which NY Paving was assigning the work to Local 10101 members. Tr. 352. Holder notified Local 175 treasurer Anthony Franco and business representative Charlie Priolo that Holder believed Local 1010 was doing asphalt work, and asked if there was anything he was supposed to do. Tr. 334: 19-25; 335. Holder recalled that Priolo asked him to try to take pictures if he saw any asphalt paving work being done by non-unit members. Tr. 336: 9-25; 337: 1-17. At that time, an employee sent Holder a picture of Local 1010 employees doing asphalt work, but Holder could not identify exactly what type of work was being done. Tr. 337: 18-25; 338: 1-18.[3]

Attorney Chaikin testified that based on reports from Local 175 representatives and members, he had filed previous charges alleging that NYP unlawfully transferred work outside the bargaining unit. Tr. 670. Chaikin further testified that those charges were subsequently withdrawn after the Region determined there was insufficient evidence to go forward. Tr. 667: 22-25; 676: 8-12.

During both the hearing before Judge Gollin beginning September 2018 and the instant hearing before Judge Esposito, Operations Manager Miceli admitted that NY Paving had transferred the asphalt portion of the emergency keyhole work for Hallen to employees represented by Local 1010. During the instant hearing, Miceli suggested that Holder's observations in April 2018 pertained to the emergency keyhole work. Miceli explained that the keyhole work followed emergency leak repairs completed by ConEd which required small, five feet by five feet digouts

[3] Respondent's Exhibit 24, admitted after the close of hearing, shows two emails sent by Shop Steward Holder to Local 175 dated April 21, 2018 and May 4, 2018 that report observations of Local 1010 crews. However, as found by Judge Esposito, neither email indicates whether the work entailed emergency keyhole work. Furthermore, it is not clear in the record whether these instances were separate and distinct from the observations he testified to at hearing.

on a street or sidewalk. Tr. 885. According to Miceli, NY Paving's contract with Hallen required it to restore the digouts by putting 4 to 12 inches of concrete back in the hole and finishing the street cuts with about two inches of asphalt. Tr. 576: 14-25, 577. Miceli testified that NY Paving had previously used Local 175 members to pave over the cuts, but stopped at some point (which Miceli could not recall) when Local 175 notified ConEd that its members were doing the work. At that point, Miceli decided to switch to using Local 1010 members to do all the keyhole work, including the asphalt finishing. Tr. 568: 18-25; 569: 1-10; 587: 23-25; 588: 1-12. Respondent presented no evidence that it had notified Local 175 of this decision to wholesale transfer the asphalt portion of the emergency keyhole work. Miceli also testified that in January 2018, NY Paving entered into a new, slightly broader contract with Hallen to do keyhole work for ConEd. Tr. 423; 586: 21-25; GC Exh. 19. The new contract with Hallen explicitly included ConEd's Standard Terms, effectively prohibiting NY Paving from using employees represented by Local 175 on the contract. Tr. 569: 8-25; 570: 1-15; 885; 890.

To further its defense that Respondent's transfer of the emergency keyhole work was *deminimus*, Miceli testified that most of the work did not involve asphalt, as eighty percent of the work took place on concrete sidewalks. Miceli then added that of this remaining twenty percent, only the top two inches of the repair consisted of asphalt. Tr. 613, 614-615, 888. However, Miceli also testified that the asphalt portion of the keyhole work regularly involved four employees doing three to four days of work a month totaling about fifteen hours. Tr. 567, 583. Once the work was transferred to Local 1010, NY Paving would usually wait until two to three days' worth of emergency keyhole work has accumulated and then have two digout crews consisting of Local 1010-represented concrete workers sent out with a four-person top crew to place asphalt to grade on the surface behind the digout crew. Tr. 567, 583-584, 613.

Local 175 Attorney Chaikin testified, without contradiction, that it was not until September 21, 2018 – when Miceli testified at the hearing before Judge Gollin - that he or anyone from Local 175 were first given any clear notice that Respondent was regularly assigning the asphalt portion of the emergency keyhole contract with Hallen to Local 1010 members. (Tr. 679: 1-23). According to Chaikin, while Respondent and Local 175 had some negotiations in August 2018 regarding to how to handle work from ConEd, the parties did not specifically discuss the Emergency Keyhole Contract, and at the time, Local 175 was uncertain as to the number or types of contracts NY Paving had with ConEd. Tr. 684: 24-25; 685: 1-2. Furthermore, Respondent and Local 175 had not reached agreement during those negotiations about any transfer of asphalt work, as NY Paving refused to continue to pay into the Local 175 Funds as had been previously agreed in the resolution of the November 2017 grievance. Indeed, Peter Miceli confirmed that no agreement was reached during the negotiations with Local 175 regarding any work contracted to NY Paving by ConEd, stating that while NY Paving had initially made an offer to pay $2 per hour of work to the Local 175 Pension Fund for any asphalt work done by non-unit members, the offer was not accepted by Local 175 and was ultimately withdrawn by NY Paving. Tr. 913.

F. NY Paving Transfers Code 92 and Code 49 Work to Local 1010 members

The testimony at hearing also established that NY Paving had assigned Code 92 and Code 42 work to Local 1010-represented employees, although Respondent had historically assigned that work to employees represented by Local 175. In fact, Operations Manager Miceli ultimately admitted that NY Paving had decided sometime in 2019 to transfer both the Code 92 and Code 49 work away from Local 175 and to Local 1010. (Tr. 873).

1. Transfer of Code 92 Work

It is undisputed that Code 92 work involves putting temporary asphalt in the concrete cuts on sidewalks during the period that a utility company is completing its work. The temporary asphalt remains in the cut while the utility company performs its work. When that work is completed, the temporary asphalt is removed and the sidewalk is restored to finished concrete. (Tr. 233: 6-13; 236: 11-19). Peter Miceli testified that Respondent historically obtained the Code 92 work from National Grid and Hallen, but that as of the time of the hearing, NY Paving obtained Code 92 work only from Hallen. (Tr. 444: 19-25; 1-8; 882).

Local 175 Shop Steward Holder testified that in the past, NY Paving assigned Code 92 work to four-member crews composed of Local 175 members, responsible for placing the final asphalt surface on the street (or "top crews"). The Code 92s were completed by the top crew first thing in the morning. Tr. 235: 12-16; 293: 18-21. Holder testified that when NY Paving assigned the Code 92s to the Local 175 top crews, he would regularly complete an average of five to six Code 92 jobs per day. Tr. 236: 1-3. In the beginning of 2019, Supervisor Zaremski told Holder that the Code 92s would no longer be done in the morning as they would have to be completed on the same day that the cut was made in the sidewalk. Pursuant to Zeremski's direction, Holder assigned two binder crews, composed of Local 175 members, to do the Code 92 work in the afternoon. According to Holder, the two binder crews were assigned the Code 92s for about three weeks until Zaremski informed Holder that Respondent would thereafter be assigning the Code 92 work to Local 1010. Tr. 244: 15-20; 344.

Local 175 Business Representative Charlie Priolo testified that in or around February 2019, he received reports from Local 175 members that NY Paving was no longer assigning them the Code 92 work. In order to investigate the reports from members, Priolo began waiting at the asphalt

plant where NY Paving picks up its asphalt, and then followed the NYP truck to its work sites. Tr. 365: 2-10. Priolo testified that on two occasions, once on March 22, 2019 and again on April 12, 2019, he followed the truck and discovered Local 1010 members placing asphalt on sidewalks for NYP. Tr. 365-367. Respondent's payroll time sheets, obtained during the hearing, confirmed that Local 1010 members Phil Santora and Jonathan Melandez were assigned to do Code 92 work in a two-man crew for the weeks including March 22, 2019 and April 12, 2019. GC Exh. 15 and 17.

Confronted with this evidence, Operation Manager Miceli admitted to transferring the Code 92 work to Local 1010 but claimed that the change in assignment of the Code 92 from Local 175 to Local 1010 was permitted by the Board's 10(k) decision. Miceli claimed that this was so because the placement of temporary asphalt is an integral part of the excavation or dig-out process that was awarded to Local 1010. Tr. 873. However, Miceli's sole reason for claiming the work to inseparable from the work assigned to Local 1010 was that the temporary asphalt was being placed on *concrete* sidewalks. Nothing in the 10(k) decision awards to Local 1010 asphalt work because it is done on concrete.

2. Transfer of Code 49 Work

The testimony of Shop Steward Holder establishes that before the Spring of 2018, Respondent had previously assigned Code 49 work to employees represented by Local 175. Code 49 work required Local 175 members to take out a sort of temporary asphalt material called cold patch from either a square or round cut and install asphalt to set the hole to the grade of the street. Tr. 252: 23-25; 253. The National Grid coding chart describes a Code 49 as binding or street paving. Tr. 404: GC Exh. 18. Holder recalled that the last time he was assigned to do Code 49 work was sometime in the late winter or Spring of 2018. After that, Respondent stopped assigning Code 49 work to Local 179 members. Tr. 255.

According to Operations Manager Miceli, Holder's description of the Code 49 was based on an older combination Code 13 from National Grid, which NY Paving used to break down internally into a Code 49 and Code 10. Starting around November or December 2018, NY Paving stopped getting the Code 13 work from National Grid after New York City changed its regulations regarding to the amount of concrete required to backfill a digout. According to Miceli, when NY Paving entered into a new contract with National Grid, it revived the Code 49 internally to describe the work from National Grid involving the digging out the cold patch and replacing the hole with asphalt. Tr. 608: 1-5, 19-21; 879. While Miceli claimed that the work involved was thus different that that described by Holder, both Miceli and Holder gave very similar descriptions of what work was and is involved in the Code 49s both before and after NY Paving discarded the old Code 13 combination code. Miceli's testimony only added that the holes made by National Grid, which are filled with cold patch, are now reinforced with temporary asphalt so that a saw can be better placed over the hole in anticipation of a sawcut. Tr. 608; 874; 880: 23-24. Miceli testified that NY Paving performs about one hundred Code 49s per month during the Spring. Tr. 876.

Miceli claimed that, like the Code 92 work, the fact that the temporary asphalt was being laid down in preparation for Local 1010 members to perform the sawcutting justified assigning the new Code 49 work contracted by National Grid to the members of Local 1010, pursuant to its interpretation of the Board decision following the 10(k) hearing. Tr. 617-618. Miceli explained that because a saw-cutter would come to cut the hole anywhere from the same day or a few days after the Code 49 is completed, both the asphalt portion of the work and the sawcutting portion were one process, and that accordingly, because the sawcutting was awarded to Local 1010 in 10(k) decision, NY Paving was justified in assigning the asphalt portion to Local 1010. Tr. 620: 11-16.

III. ARGUMENT

Respondent argues in its Exceptions and supporting brief that the ALJ (A) abused her discretion by supplementing the record, *sua sponte,* with the 2014-2017 CBA rather than drawing an adverse inference against CGC for her failure to introduce the CBA in her case in chief, (B) erred in rejecting Respondent's defense that the transfer of the emergency keyhole work was time-barred under Section 10(b) of the Act, (C) erred by refusing to rely solely on the *percentages* of asphalt work and material involved in the Emergency Keyhole Contract to conclude that the transfer of the keyhole work was *de minimums,* (D) used the incorrect legal standard in rejecting Respondent's defense that it had no control over the transfer of the emergency keyhole work, (E) erred by refusing to find that Respondent was permitted to transfer the Code 92 and Code 49 work pursuant to the Board's 10(k) decision in *Highway Road and Street Construction Laborers, Local 1010 (New York Paving),* 366 NLRB NO. 174 (August 24, 2018), and (F) erred by failing to consider testimony from three employee witnesses who were uncertain of Steven Sbara's level of authority in the company, which Respondent claimed proved Sbara was not its agent. As demonstrated below, Respondent's exceptions to Judge Esposito's decision are not supported by fact or law. Accordingly, Judge Esposito's decision should be affirmed in its entirety.

A. The ALJ Did Not Err in Finding CGC Established a *Prima Facie* Case and Refusing to Make an Adverse Inference Against CGC for her Failure to Introduce Into Evidence the 2014-2017 in her Case in Chief, and Acted within her Discretion in Supplementing the Record with the 2014-2017 CBA (Exceptions 1-10).

A large part of Respondent's exceptions relate to the ALJ's admission and reliance on the 2014-2017 CBA. Respondent's exceptions on this point can be separated into three different arguments: (1) that Judge Esposito erred by refusing to find that CGC failed to meet her burden in presenting a *prima facie* case that Respondent had unlawfully transferred the Code 92 and Code

49 work by her failure to introduce the 2014-2017 CBA as part of her case in chief;[4] (2) that the ALJ abused her discretion by refusing to make an adverse inference against CGC for her failure to introduce the 2014-2017 CBA (the best evidence available regarding the scope of Local 175 unit work); and (3) that the ALJ further abused her discretion by supplementing the record, *sua sponte,* and admitting the 2014-2017 CBA after the close of hearing. In making its exceptions, Respondent ignores the judicial notice granted by the ALJ to the prior cases involving the parties which excerpts key parts of the 2014-2017 CBA, misrepresents the adverse inference rule, and ignores the authority granted the ALJ in admitting probative evidence. Accordingly, Respondent's exceptions 1 through 10 have no merit.

First, contrary to Respondent's assertion, the ALJ had sufficient evidence at the close of CGC's case in chief to find CGC had presented a *prima facie* case the Code 92 and Code 49 work was contractually and historically part of Local 175's bargaining unit work, and that Respondent had unilaterally transferred that work to employees outside the Asphalt Unit. The ALJ had taken judicial notice, upon CGC's request, of two prior decisions involving the parties, *Highway Road and Street Construction Laborers, Local 1010 (New York Paving),* 366 NLRB NO. 174 and *New York Paving, Inc.,* JD-33-19. Both prior decisions contained relevant excerpts of the 2014-2017 CBA defining asphalt paving work belonging to Local 175. It is well-established that under § 16–201 FRE 201, the Board may take administrative notice of its own proceedings. *Metro Demolition*

[4] Respondent's extremely obstinate posture at each and every stage of the proceedings was the reason for CGC's decision to rely on the relevant excepts of the 2014-2017 CBA to show that the work was properly in Local 175's jurisdiction, rather than introducing into the record the entire CBA, as Respondent had admitted to adopting the contract in prior proceedings. The decision was made at the time as it was anticipated that Respondent would unnecessarily prolong and muddy the record by contesting the applicability of the 2014-2018 collective bargaining agreement, as Respondent claims to have "terminated" the contract, and had filed charges against Local 175 (subsequently withdrawn) alleging a refusal to bargain where Local 175 represented the existence of a new collective bargaining agreement negotiated between itself and the multiemployer representative, NYICA.

Co., 348 NLRB 272 n. 3 (2006). See also *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 3 n. 14 (2018) (Board took administrative notice of a settlement agreement between the discriminatee and the respondent in another case that was pending on exceptions before the Board), enfd. per curiam 779 Fed. Appx. 752 (D.C. Cir. July 12, 2019). Here, the excerpts from the 2014-2017 CBA in prior cases supported CGC's burden in showing that the work in question was Local 175's bargaining unit work, and thus ALJ Esposito's judicial notice of those decisions gave her sufficient evidence of a *prima facie* case that the Code 92 and Code 49 work should have been assigned to Local 175 even in the absence of the entire 2014-2017 CBA.

The ALJ's finding that CGC established a *prima facie* case that Respondent unlawfully transferred the Code 92 and Code 49 work is also supported by the credible testimony of Local 175 Shop Steward Terry Holder who described in great detail about the nature of the Code 92 and Code 49 work and Respondent's past practice, up until the beginning of 2019, of assigning of that type of work to employees represented by Local 175. Respondent presented no evidence contradicting Holder's detailed and credible testimony. Thus, the ALJ appropriately relied on Holder's testimony to conclude that the record had established "that prior to 2018, NY Paving assigned all work involving the placement of asphalt to members of Local 175." JD(NY)-01-20 at p.34, citing *Midwest Terminals of Toledo International, Inc.,* 365 NLRB No. 134 at p. 11 for the principle that prohibitions on the unilateral transfer of work applies to established past practices even if such past practices were not explicitly articulated in the collective bargaining agreement.

Second, Respondent's assertion that Judge Esposito abused her discretion by failing to draw an adverse inference against CGC for failing to introduce the 2014-2017 CBA in her case in chief misrepresents the nature of the adverse inference rule and ignores its limited application to circumstances where it is more likely than not that the evidence which the party failed to produce

would be *contrary* to the that party's claim. In *S&F Mkt. St. Healthcare LLC d/b/a Windsor Convalescent Ctr. of N. Long Beach & Serv. Employees Int'l Union, Local 434b & Annie Moss & Tara Smith*, 351 NLRB 975 (2007) the Board explains that:

> The mere fact that the adverse inference rule is widely recognized and followed does not, by itself, demonstrate that the Labor Board commits reversible error when it declines to utilize it. Generally, as the dissent argues, whether to draw the inference is a matter of discretion for the fact finder.

Id. at 986. In fact, all the cases cited by Respondent to support its claim that the ALJ should have drawn an adverse inference against CGC are inapplicable here, as they all involve either the Respondent's failure to call a witness under its control, or Respondent's failure to produce documents under its exclusive control. See *Int'l Automated Machines*, 285 NLRB 1122, 1123 (1987)(adverse inference drawn against respondent where missing witness was member of management); *Martin Luther King, Sr., Nursing Ctr.*, 231 NLRB 15, 15 (1977); (adverse inference drawn against respondent for its failure to call supervisor as witness); *Earle Indus., Inc.*, 260 NLRB 1128, 1128 (1982)(Board approves ALJ's adverse inference because of respondent's failure to call supervisor); *Metro-W. Ambulance Serv., Inc. & Teamsters Joint Council #37, Int'l Bhd. of Teamsters & Teamsters Local #223, Int'l Bhd. of Teamsters*, 360 NLRB 1029, 1030 (2014) (Board affirms ALJ's adverse inference to respondent's failure to produce subpoenaed documents); *RCC Fabricators, Inc.*, 352 NLRB 701, 712 (2008) (respondent's failure to produce documents that would show supervisory status of witness warranted adverse evidence as it was the best evidence available and could not be supplemented by the weaker evidence of witness testimony.); *Extreme Building Services Corp.*, 349 NLRB 914, 931 (2007) (respondent's failure to produce disciplinary records, some of which were nevertheless introduced by the General Counsel, led to adverse inference that had they been produced they would have supported General Counsel's case). Respondent's reliance on *Offset Paperback Mfrs, Inc.* 359, NLRB 265, 266 (2012) and *Scufari*

Construction Co., Inc., 368 NLRB No. 40, at 1, fn 2 (2019), is also misplaced. since neither case involves the drawing of an adverse inference, but rather focus on the General Counsel's improper attempt to amend the complaint in its post hearing brief. Here, Respondent does not contend that CGC attempted to amend the complaint in its post-hearing brief. No new allegations are being raised, and Respondent has been fully afforded due process.

Respondent also mistakenly relies on dicta in *Quicken Loans, Inc. & Austin Laff,* 367 NLRB No. 112 (Apr. 10, 2019), where the Board reversed an ALJ's adverse inference against the respondent when it failed to call a witness. The Board in *Quicken* found that the ALJ inappropriately filled "an evidentiary hole in the record" by inferring that had the witness been called, he could have testified that his statements were the continuation of other complaints, supporting the General Counsel's claim that the Charging Party engaged in protected concerted activity. While Respondent attempts to liken the ALJ's inappropriate filling of the "evidentiary hole" in *Quicken* to Judge Esposito's supplementing the record with the full 2014-2017 CBA, the situation here is inapposite. The evidence at issue here pertains to documentary evidence (the 2014-2017 CBA), not live testimony, which had been excerpted in multiple past proceedings. Furthermore, upon admitting the CBA into this record, the ALJ found the document to support CGC's case, making an adverse inference completely inappropriate.

Moreover, Respondent's argument in its Exceptions brief that it was CGC's burden to introduce the best evidence and that the ALJ should have drawn an adverse inference against CGC for her failure to introduce into evidence the 2014-2017 CBA conflates the "adverse inference" rule with the "best evidence" rule. Under the best evidence rule, a party can object to the admission of testimony or documentary evidence on the grounds that there is other, more reliable evidence available. In *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. N.*

L. R. B., 459 F.2d 1329 (D.C. Cir. 1972), the D.C. Circuit explained that the best evidence rule has nothing to do with the adverse inference rule, as "the best evidence requirement is an exclusionary rule which suppresses weak evidence in situations where nonproduction of best evidence is unexplained. In contrast, the adverse inference rule excludes no evidence." *Id.* at 1339–40. Aside from its conflation of the two evidentiary rules, it is likely here that Respondent did not raise a "best evidence" objection to Holder's testimony because it was aware that inclusion of the 2014-2017 CBA would only support CGC's claim

Finally, Respondent's contention that Judge Esposito abused her discretion by supplementing the record, *sua sponte,* with the entire 2014-2017 CBA is completely unfounded. Section 102.35(a)(11) of the NLRB Rules and Regulations expressly grants authority to administrative law judges "to call, examine, and cross-examine witnesses and *to introduce documentary and other evidence*." (emphasis added). Here, CGC relied on the excerpts of the CBA in prior records to establish what constituted bargaining unit work and therefore to support the allegation that Respondent had unlawfully transferred bargaining unit work. The ALJ, seeking a more complete record, requested the CBA in its entirety after the close of the hearing, allowing the parties an opportunity to submit positions regarding the admission of the 2014-2017 CBA before issuing her decision. The ALJ's introduction of the 2014-2017 CBA upon reopening of the record and her admission of the CBA into evidence after considering the parties positions was completely permissible under the Board's Rules and Regulations.

B. Contrary to Respondent's Exceptions 12 – 16, the ALJ's Finding that Local 175 Had no Actual or Constructive Notice that Respondent was Transferring the Asphalt Paving Portion of its Emergency Keyhole Contract with Hallen Until September 2018 is Wholly Supported by the Record.

Respondent contends that the ALJ mistakenly rejecting its defense that its unilateral transfer of the emergency keyhole work was known to Local 175 more than six months before

filing of the charge and that the allegation is thus barred under Section 10(b) of the Act. In support of its claim, Respondent argues that Judge Esposito failed to draw a conclusion that Local 175 had knowledge that NY Paving had transferred the asphalt portion of its Emergency Keyhole Contract with Hallen to Local 1010 from Shop Steward Holder's testimony about his observations of Local 1010 members using asphalt trucks to do work for ConEd, and Holder's emails, admitted into the record as Respondent Exhibit 24, showing that Holder had informed Priolo as early as Aril 21, 2019 of three Local 1010 crews going to Manhattan, the Bronx, and Brooklyn. In its Exceptions Brief, Respondent further claims that because it is "undisputed" the Hallen contract was the only work that NY Paving was doing for ConEd at the time, this evidence of intermittent observations by Local 175 more than six months before filing its charge was sufficient for the ALJ to find that the allegation was time barred. However, Respondent cites nothing in the record to show that, even if it were true that NY Paving's only work for ConEd was derived through the Hallen Emergency Keyhole Contract, Local 175 was aware of that fact.

Judge Esposito's rejection of Respondent's defense was based on the Board's requirement in order to make out a defense under Section 10(b) of the Act, the party making the defense must show that the charging party had "clear and unequivocal notice" of the unfair labor practice more than six months before filing of the charge. *See Taylor Ridge Paving & Constr., Co.*, 365 NLRB No. 168 (Dec. 16, 2017). In *Taylor Ridge Paving & Const., Co.,*, relied on by Judge Esposito, the Board found that four communications from the employer to the union giving notice of the employer's intent to terminate its collective bargaining agreements were insufficiently "clear and unequivocal" because they referenced two different effective dates for contract termination, used tentative language, and failed to clarify which contractual relationship was being terminated. Here, Judge Esposito could easily apply *Taylor Ridge Paving & Const., Co.* to reject Respondent's

argument that Local 175's intermittent observations constituted "clear and unequivocal notice," as Respondent provided *no* communication to the Union regarding its decision to transfer the keyhole work until September 2018, at the hearing before Judge Gollin.

Furthermore, Judge Esposito correctly rejected Respondent's argument that Local 175 failed to exercise due diligence in investigating rumors of a transfer of work that Respondent argues constituted "actual" or at least "constructive" knowledge. The cases cited by Respondent where the Board found the charging party to have failed in its exercise of due diligence and thus surmised that it had constructive knowledge of the unfair labor practice outside the 10(b) period can easily be differentiated: In *Phoenix Transit System,* 335 NLRB 1263 (2001), the Board upheld the ALJ's finding that the charging party's allegation against the Union for causing his discharge was barred under Section 10(b) where the charging party admittedly began suspecting the union's involvement in revealing information about his felony history to the Employer more than six months before filing his charge. In *Moeller Bros. Body Shop, Inc.* 306 NLRB 191 (1992), the Board upheld the ALJ's finding that the Union failed to exercise due diligence when it failed to regularly visit the shop or to supply a shop steward while it was contractually permitted to do so. In *Alaska Pulp Corp.,* 300 NLRB 232 (1990), the Board upheld the ALJ's finding that the charging party's allegation that the Employer had unlawfully terminated her reinstatement rights was barred by Section 10(b) of the Act where the evidence showed that the Employer had attempted to contact the Charging Party over the phone and by email to offer her reinstatement and had given her an ultimatum for accepting their offer outside the 10(b) period. In all three cases, the party against whom the 10(b) argument was being made either had failed completely to exercise any due diligence in policing its contract, or was given considerably more notice of the alleged unfair labor practice by the other party. As found by Judge Esposito, there is no evidence here establishing that

the Union failed to police its contract. Rather, Steward Holder and Priolo made diligent attempts to monitor if and when asphalt work was being improperly assigned to Local 1010. Respondent's claim that Local 175 Shop Steward Terry Holder would have known of any transfer of work because employees are all required to be at Respondent's Long Island facility in the morning. Respondent's argument here does not take into account the fact employees set out to different types of work throughout the day. In fact, both Priolo and Holder testified that certain asphalt work, such as the Code 92s, started to take place at different times during the day at the time that Respondent began transferring the work.

Moreover, Local 175's filing of prior charges alleging Respondent's unlawful transfer of unit work are evidence that the Union was exercising due diligence in policing its collective bargaining agreement. In *O'Neill, Ltd.,* 288 NLRB 1354, 1356 (1988), relied on by Judge Esposito, the Board found that the Union's prior filing of charges, despite its inability to discover sufficient evidence of an unfair labor practice to warrant issuance of a complaint, made it clear that the Union "acted diligently and vigorously to obtain facts that would support an unfair labor practice. *Id*. at 1356. Here, Local 175 had filed multiple prior charges alleging an unlawful transfer of work, including charges in response to Shop Steward Terry Holder's April 2018 communications of observing asphalt paving trucks being used by Local 1010 employees. At that time, neither Local 175 nor the Region were able to adduce enough information about how frequently this transfer of work was taking place or what type of work was being transferred to support issuance of a complaint, so the allegations were withdrawn.

Thus, the ALJ was correct in rejecting Respondent's 10(b) defense with regard to the emergency keyhole work, finding that Respondent failed to give Local 175 "clear and unequivocal

notice" of its intent to transfer the work until Miceli's testified in September 2018 before Judge Gollin. Furthermore, ALJ was correct in finding that Local 175 exercised due diligence in attempting to investigate the rumors that Respondent was transferring work, and that dismissal pursuant to 10(b) on grounds that it had failed to adequately police its contract was unwarranted as well.

C. The ALJ correctly concluded that the transfer of the asphalt portion of the emergency keyhole work was a material, substantial and significant change creating an obligation to bargain (Exceptions 12, 20-21).

In its Exceptions, Respondent contends that ALJ Esposito failed to apply the standards set forth in *North Star Steel Co.,* 347 NLRB 1364 (2006) requiring a unilateral change to be material, substantial, and significant." To this end, Respondent argues that the ALJ improperly relied on Operations Manager Peter Miceli's testimony regarding the number of monthly hours required to perform the asphalt portion of the keyhole work as opposed to Miceli's testimony regarding the percentage of asphalt work and material involved in the Hallen contract. In addition, Respondent contends that the ALJ's application of *Ruprecht Co.,* 366 NLRB No. 179 (2018) is inapposite because *Ruprecht* focused on the number of non-unit employees who performed unit work, and that *North Star Steel Co.* is more factually similar because it involved an analysis of the percentage of total monthly work that was transferred.

Respondent's argument is incorrect. Contrary to Respondent's assertion, ALJ Esposito carefully analyzed the standards in *North Star Steel Co*. in her analysis of whether Respondent's transfer of unit work was substantial. The ALJ found that amount of work transferred in *North Star Steel Co.* differed significantly from this case. *North Star Steel Co.* involved a *single* incident of the transfer of a fraction of a percent of material. In contrast, the ALJ correctly relied on the record evidence establishing that NY Paving had been assigning, on an ongoing basis, an average

of fifteen hours of asphalt paving work per month to non-bargaining unit employees. Based on these facts analyzed under *North Star Steel Co.* standards, the ALJ correctly concluded that NY Paving's transfer of the asphalt portion of the emergency keyhole work was a material, substantial and significant change. Respondent's claim that ALJ Esposito's failure to rely solely on the percentages testified to by Respondent (and her refusal to ignore the fact that the transfer would likely repeat throughout the length of Respondent's contract with Hallen), is unpersuasive.

Finally, despite Respondent's contentions, Judge Esposito correctly found that CGC had no additional burden to produce evidence that any Local 175 member was adversely affected by the transfer of work. Judge Esposito was well supported in finding that "the Board has repeatedly found that a transfer of bargaining unit work is material, substantial and significant even where there is no evidence that bargaining unit employees were laid off as a result, and no evidence of any impact on their wages and hours." JD(NY)-01-20 citing e.g., *Matson Terminals, Inc.*, 367 NLRB 35 No. 20 at p. 1, fn. 2 (no evidence of impact on employee compensation necessary to establish substantial and material change due to transfer of bargaining unit work); *Comau, Inc.*, 364 NLRB No. 48 at p. 21 (2016) (same); *Mi Pueblo Foods*, 360 NLRB 1097, 1097-1099 (2014) (transfer of bargaining unit work material and substantial even absent layoffs or significant impact on wages and hours for bargaining unit employees). The Board has stated that it is "plain" that a bargaining unit "is adversely affected whenever bargaining unit work is given away to non-unit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit." *Overnite Transportation Co.*, 330 NLRB 1275, 1276, aff'd. and rev'd. in part, 248 F.3d 1131 (3rd Cir. 2000); see also *Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 1, fn. 2 (General 5 Counsel "met his burden" to establish a substantial and material change "by showing that the Respondent

transferred barge menu work – which had been exclusively performed by unit employees – to non-unit employees"). Respondent provides no citations for its claim, aside from drawing some similarity to *North Star Steel Co.,* that it was CGC's burden to show that the change had an adverse effect on Unit employees.

D. The ALJ Properly Rejected Respondent's Defense that it was Forced to Transfer the Emergency Keyhole work because of a Third Party (Exceptions 12, 17-19).

Contrary to Respondent's claim, Judge Esposito applied the correct legal standard in rejecting Respondent's defense that it was free to unilaterally transfer the emergency keyhole work out of the bargaining Unit because of ConEd's enforcement of its Standard Terms in the Emergency Keyhole Contract. In drawing her conclusion, Judge Esposito relied on *RBE Electronics. of S.D., Inc.*, 320 NLRB 80, 81 (1995), in which the Board laid out a concise explanation of the limited exceptions to an Employer's duty to bargain over changes to terms and conditions of employment, including what came to be described as a the "economic exigency exception":

> The Board in *Bottom Line* recognized two limited exceptions to that general rule: when a union engages in tactics designed to delay bargaining and "when economic exigencies compel prompt action." Id. at 374…The "economic exigency" exception set forth in *Bottom Line* derives from the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736, 748 (1962), as discussed in the Board's decision in *Winn-Dixie Stores*, 243 NLRB 972, 974 fn. 9 (1979). Although those decisions essentially condemn piecemeal bargaining, they provide support for the view that there might be some circumstances justifying or excusing an employer's taking action while bargaining is ongoing. These circumstances were described in *Winn-Dixie* as involving "extenuating circumstances" and a "compelling business justification." In cases subsequent to *Bottom Line*, the Board has characterized the economic exigency exception as requiring a heavy burden, and as involving the existence of circumstances which require implementation at the time the action is taken or an economic business emergency that requires prompt action.

As explained by Judge Esposito, the Board has repeatedly held that economic expediency or sound business considerations are insufficient defenses to justify unilateral changes in terms

and conditions of employment. *Angelica Healthcare Servs.*, 284 NLRB 844, 852–53 (1987)(Employer defense that loss of a significant contract, entailing a 14% loss in revenue, justified implementation of changes without prior notice to Union not considered a "compelling economic consideration"); *Farina Corp.*, 310 NLRB 318, 321 (1993) (Employer's layoff of five employees without giving notice and opportunity to bargain with Union held to be unlawful despite Employer's reduction in business volume); *The Ardit Co.*, 364 NLRB No. 130 (Oct. 27, 2016)(Respondent's loss of a major contract with the Ohio State University and unsuccessful bid for another contract deemed to not rise to the level of a "dire financial emergency that would completely suspend the duty to bargain" about layoffs).[5]

Respondent now claims in its exceptions brief that it was only upon receiving the contract from Hallen (itself a contractor for ConEd) that it realized that ConEd was enforcing its Standard Terms, and that it was contractually forbidden from using Local 175 members to do the keyhole work, and that it therefore had no choice but to transfer the work. The record shows, however, that Respondent had stopped using Local 175 members on the keyhole work even before receiving Hallen's January 2018 contract, and thus had more than enough notice to negotiate new terms or choose to forego the contract. (Tr. 597-598). Furthermore, there is no evidence in the record establishing that Respondent was unaware that the Standard Terms Hallen planned to include until after the contract with Hallen was signed. Despite the fact that assigning the temporary asphalt

[5] More recently, ALJ Gardner came to the same conclusion in two cases involving two companies who also sought to evade their obligation to bargain with Local 175 pursuant to ConEd's enforcement of its Standard Terms by creating alter egos. See *Tri-Messine Construction Co*., 368 NLRB No. 149 (Dec 16, 2019); see also *Nico Asphalt Paving, Inc*., 368 NLRB NO. 111 (Nov. 6, 2019). In both Tri-Messine and Nico, ALJ Gardner stated, "the Board does not recognize a company's financial challenges as justification for ignoring its existing collective-bargaining relationships or agreements and forming a new entity." (citing *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73 (2016), enfd. 892 F.3d 362, 374 (2018).

work to non-unit employees clearly violated the terms of its collective bargaining agreement with Local 175 and its past practices, Respondent knowingly entered into the contract with Hallen.

Nevertheless, Respondent contends that Judge Esposito should have relied on two other cases that held that respondent's unilateral change was justified because of a third parties actions: *S. Mail, Inc., et al, A Single Employer & Am. Postal Workers Union, AFL-CIO*, 345 NLRB 644, 651 (2005) and *Exxon Research & Eng'g Co. v. N.L.R.B.*, 89 F.3d 228, 232 (5th Cir. 1996). In *S. Mail, Inc.*, the Board found a that a third party, the United States Postal Service, required a change in schedule and the elimination of two stops that resulted in changes to terms and conditions of employees work for which the employer had no control. However, the Board still found the employer violated Section 8(a)(5) of the Act by making *additional* changes to the route stemming from the changes by the USPS. The case can be differentiated in that, here, neither ConEd nor Hallen were Respondent's only client, and thus Respondent did have control in deciding whether to adhere go or to forego the contract in order to be able to adhere to its prior contractual obligations. Furthermore, Judge Esposito's reliance on the bulk of cases holding that such potential loss of a client does not justify an employer's failure to adhere to the terms of its collective bargaining agreement was entirely justified. With regard to *Exxon Research & Eng'g Co.*, Judge Esposito correctly explained that the case is not controlling as it is well-settled that the Board generally adheres to a "nonacquiescence policy" with respect to appellate court decisions that conflict with Board law, unless the Board precedent is reversed by the Supreme Court. See, e.g., *D.L. Baker, Inc.*, 351 NLRB 515, 529 at fn. 42 (2007).

Here, the ALJ correctly found that Respondent had control over the assignment of work to its employees, and Respondent was obligated to follow the terms of its collective bargaining agreement. Its failure to do so was based on its desire to retain its contract with Hallen for the

Emergency Keyhole contract and avoid economic loss. Respondent has not provided any evidence to show that this loss was significant enough to constitute a "economic exigency." Thus, ALJ Esposito applied the correct legal standard in finding that Respondent's economic incentives to enter into the contract did not justify violating the terms of its collective bargaining agreement with Local 175, finding that the weight of the evidence supported her conclusion.

E. The ALJ was correct in finding that Respondent had a duty to provide notice and opportunity to bargain to Local 175 over Code 92 and Code 49 work (11, 22-26).

Respondent's argument that Judge Esposito erred by failing to find that the Board's 10(k) decision *Highway Road and Street Construction Laborers, Local 1010 (New York Paving)* permitted the transfer of Code 49 and Code 92 work to Local 1010 employees is completely unfounded.[6] In *Midwest Terminals of Toledo Int'l, Inc. & Int'l Longshoremen's Ass'n, Local 1982, Afl-Cio & Prentis Hubbard*, 365 NLRB No. 134 (Oct. 11, 2017), the Board rejected a similar argument by the Employer that a 10(k) decision allowed it to transfer additional work from one Union to another. Here, the undisputed record evidence establishes that Code 49 and Code 92 work involved the placement of temporary asphalt, work historically done by Local 175. As found by Judge Esposito, Local 175's certification and collective bargaining agreement specifically refer to the asphalt work and the placement of temporary asphalt. The Board decision in the 10(k) hearing to allow NY Paving to assign sawcutting and excavation work to Local 1010 was based on its determination that - while both the Local 175 and Local 1010 contracts could be reasonably interpreted to include sawcutting and excavation work- Local 1010's unit description more

[6] In its Exceptions, Respondent states that Judge Esposito erred in considering *NLRB v. Seedorf Masonry, Inc.*, 812 F.3d 1158 (8th Cir. 2016), as it required the ALJ to consider the 10(k) decision and other factors. As an initial matter, there was no 10(k) determination in *Seedorf*, as the company's charge against the Union was dismissed by the Board's Regional Director. Furthermore, the case is not controlling on the Board, being a circuit decision.

squarely covered this work. The Board did not find that work involving asphalt in preparation for work involving concrete made all the work involved one integrated process, as NY Paving now claims. Furthermore, Respondent's argument that the ALJ's admission of the 2014-2017 CBA deprived it of due process because it would have otherwise introduced the Local 1010 CBA is blatantly false, as Respondent was free to provide any evidence during the course of the hearing showing that the Code 92 and Code 49 work was not Asphalt Unit work. Furthermore, as both the contractual evidence and evidence of past practice showed that the Code 92 and Code 49 work were traditionally Asphalt Unit work, Respondent's argument seems to suggest that is now seeking to initiate another dispute under Section 10(k) of the Act. However, such a dispute would be inappropriate to raise during the course of this unfair labor practice proceeding as no relevant charge has been filed.

F. The ALJ Appropriately found that Sbara was a Section 2(13) Agent.

Respondent excepts to the ALJ's finding that that Stephan Sbara was acting as an agent for NY Paving under Section 2(13) of the Act, contending that her reliance on CGC witness Elijah Jordan's testimony was unjustified and that Respondent's witnesses testimony proved that Respondent's employees did not understand Sbara to be an agent. Respondent further claims that its employee witnesses' testimony shows that they turned to Sbara for help with issues at the workplace because of his role as shop steward, and not because he was an agent of NYP.

Respondent's contentions are unjustified as Judge Esposito did not rely on Jordan's testimony in making her finding that Sbara was Respondent's agent, but rather relied on testimony from Respondent's own managers about the duties and authority they gave Sbara. Her decision to not consider the other employee witness testimony was entirely justified as it did not provide any substantial evidence for which to decide the issue.

In finding Sbara to be Respondent's agent under Section 2(13) of the Act, Judge Esposito explained that the Board considers whether "under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." citing, e.g., *Pan-Oston Co.*, 336 NLRB 305, 305-306 (2001); see also *D&F Industries*, 339 NLRB 618, 619 (2003). Judge Esposito further explained that in many cases, the Board has evaluated the purported agent's role in acting as a "conduit of information" between management and the employees, so that the employees would conclude that the alleged agent was speaking on management's behalf. See, e.g., *Victor's Café 52*, 321 NLB 504, fn. 1 5 (1996) (agent was "the usual conduit for communicating management's views and directives to employees, from the time of their hiring through their daily accomplishment of their tasks"); *Southern Bag Corp.*, 315 NLRB 725 (1994) (agent was "an authoritative communicator of information on behalf of management"); *B-P Custom Building Products*, 251 NLB 1337, 1338 (1980) (agent "relayed information from management to 10 employees and had been placed by management in a strategic position where employees could reasonably believe he spoke on its behalf").

Accordingly, Judge Esposito was entirely justified in relying on testimony from Respondent's managers, Peter Miceli and Louis Sarro, who both testified that they had Sbara speak on their behalf to unit employees, to conclude that Sbara was Respondent's agent. Specifically, Judge Esposito relied on Miceli's testimony on direct examination that when Sbara relays a message to the concrete workers, "I'm sure they think it's coming from me or Sarro." Tr. 939. Judge Esposito was thus justified in finding that NY Paving routinely placed its Local 1010 shop steward, Sbara, in a quasi-managerial position by placing him in the position of being the voice of the companies' needs and demands. Respondent's admission that Sbara routinely spoke to

employees on behalf of management plainly supports the ALJ's conclusion that Sbara is an agent of Respondent, within the meaning of Section 2(13) of the Act.

IV. CONCLUSION

For all of the above reasons, the Board should reject the exceptions raised by Respondents in their entirety and adopt Judge Esposito's decision in its entirety.

Dated: June 10, 2020

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CERTIFICATE OF SERVICE

Pursuant to the National Labor Relations Board's Rules and Regulations, the forgoing Counsel For The General Counsel's Answering Brief to Respondent's Exceptions to ALJ's Decision was served via electronic mail on this 10th of June, 2020, on the following parties:

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